United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

77-7164

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE DUCKETT and DELORES DUCKETT,

Plaintiffs-Appellants,

—v.—

EVE SILBERMAN,

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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The following propositions represent replies to statements made by the Defendant-Appellee in her Brief to this Court.

I.

Agency

Merely because there is no written agreement of agency by and between individuals does not foreclose an agency relationship. Certainly there was no written agreement between the Defendant-Appellee and Mr. Smetana, the real estate broker involved herein; but no one would or could deny that, in his efforts, he was acting for and on behalf of the Defendant-Appellee as her agent in the sale of the premises in question herein. So too, both Mrs. Ravelle Brickman (daughter of the Defendant-Appellee) and Mrs. Silberman's son were acting for and on her behalf in her

efforts to sell her house and, thus, as her agent, notwithstanding the absence of a written agreement relative thereto.

There can be no doubt whatsoever, reading the record herein as a whole, that the Defendant-Appellee did little, if anything, in the way of seeking out potential purchasers for her house, save for signing the appropriate agreements relative thereto after the persons working for and acting on her behalf (including her daughter, her son, her attorney and her real estate broker) did secure a purchaser.

Appellee's counsel makes reference to Section 5-701 of the General Obligations Law of the State of New York as authority for the proposition that, without a writing, no agency can exist. Section 5-701 of the General Obligations Law does not stand for such a proposition; and the Appellee's interpretation, otherwise, is in error.

In effect, Section 5-701 (10) forecloses an agent in an agency relationship from securing compensation for services rendered in negotiating a real estate transaction unless the agreement to compensate is in writing. However, the substance of Section 5-701 does not negate the existence of the agency relationship. That relationship exists irrespective of the written document. Section 5-701 does undercut an agent's ability to collect compensation for services rendered in negotiating a real estate transaction. Significantly, licensed real estate brokers are exempted from the operation of Section 5-701; and thus, notwithstanding the absence of a written agreement between broker Smetana and the Defendant-Appellee herein, broker Smetana would have been able to collect compensation (as agreed upon) for his services rendered as an agent for and on behalf of the Defendant-Appellee herein. See:

Blackburn & Company v. *Park*, 357 F.2d 525 (2nd Cir. 1966).

In the instant case no one has asserted that Mrs. Brickman or the Defendant-Appellee's son were seeking compensation for their respective efforts in assisting their mother in negotiating the sale of her house. If they were seeking compensation in this regard, then under Section 5-701 of the General Obligations Law they would have been required to reduce the compensation related terms of the agency to writing. But in the instant case, such is irrelevant; and the agency relationship exists[1] notwithstanding Section 5-701 of the General Obligations Law.

II.

The Broker

There can be no doubt but that a broker *qua* agent was utilized during the course of the sales effort herein. Thus there is a prima facie case of agency in this case, unrebutted, irrespective of the agency of the Defendant-Appellee's son and daughter (without, of course, conceding

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[1] See: *Cerp Construction Co.* v. *Cleary, Inc.*, 59 Misc. 2d 489, 299 N.Y.S. 2d 560, 563 (S.Ct. Kings County 1968) where the Court noted:

> "The fact that the parties do not understand the exact nature of the relationship is not significant, if the agency may be reasonably implied from the their words and conduct (Krstovic v. Van Buren, 200 App. Div. 278, 193 N.Y.S. 181, reversed on other grounds, 235 N.Y. 96, 138 N.E. 749 (1923); Rubenstein v. Small, 273 App. Div. 102, 75 N.Y.S. 2d 483 (1st Dept. 1947))."

It is submitted that, in applying this principle herein, there can be little, if any, doubt that the Defendant-Appellee's daughter and son, as well as Mr. Smetana and Mr. Murray (her attorney), by their conduct were acting for and on behalf of the Defendant-Appellee in securing a purchaser for her house and in otherwise negotiating a contract for its sale with said person or persons.

that theirs was not an agency relationship with their mother throughout the entire transaction).

The Defendant-Appellee should not now be permitted to assert that the ultimate sales contract was consummated without the use of a broker, thereby permitting her to circumvent the Fair Housing Act of 1968 (42 U.S.C. Sections 3601 *et seq.*) since it would frustrate the purpose of the act to do so. The transaction in its substantial part was negotiated by and through the use of a licensed real estate broker. Ultimately, the seller chose to convey the premises in question herein to a white person after the broker apparently ceased in his efforts in this regard (although the evidence is not clear in this respect since it is apparent that the broker continued in his efforts right up to the end of September if not thereafter). That he did not receive a commission in this matter is admitted (at least insofar as the evidence reflects).

Certainly, however, insofar as jurisdictional and agency concerns are raised in this regard, the focus relative to the broker must be in connection with the assertion by the Plaintiffs-Appellants that they were denied ultimate purchase of the premises here in question because of their race, a factor which was raised and discussed by and between the broker and the Defendant-Appellee's other agents during the course of the transaction. There can be no doubt about that fact; and that fact is sufficient, in the context of the circumstances asserted and established herein, to make the Fair Housing Act of 1968, *supra*, jurisdictionally operative. A reading otherwise would be unreasonable and would frustrate the very purpose of the Act and sanction conduct which is prohibited by the Act.

III.

Contract Conditions

Defendant-Appellee seeks to minimize the conditions included in the Beer sale of contract as inadvertent and otherwise meaningless. Those conditions nevertheless exist; and apparently Appellee admits the same. She has no other alternative in view of the fact that the conditions are set down in writing and that writing is before the court. The contract of sale reflects that Mr. Beer, the ultimate purchaser (who is white), did secure contract conditions which the Plaintiffs-Appellants had asked for (after the price was agreed upon) and which were rejected as out of hand. Ultimately the Plaintiffs-Appellants withdrew the conditions (before Mr. Beer appeared in the picture); but to no avail.

It cannot be overlooked, moreover, that the assertion of inadvertence is just that—an assertion. There is no evidence whatsoever that the conditions were inadvertently included within Mr. Beer's sale of contract; and there is no such evidence because an effort at producing such would be foolish. The conditions are there in writing in the contract; and they were obviously included therein where they were held to be not only not acceptable when the Plaintiffs-Appellants were involved but a barrier to completing the transaction (even after the Plaintiffs-Appellants withdrew the conditions).

It cannot be under emphasized, as well, that Mr. Beer, the ultimate purchaser, was permitted to raise certain contract conditions at the closing and allowed to withdraw the same, without prejudice, unlike the Plaintiffs.

It is noted in West's McKinney's Forms, R.P.P., at page 13 that:

> "Parties are now ready through their attorneys to workout the terms of the contract. In the average case, each party usually takes a very active hand in 'hammering out' the details of such contract."

Once the price of the premises in question herein was agreed upon between the Plaintiffs-Appellants and Defendant-Appellee, in this average real estate transaction, the Plaintiffs-Appellants were foreclosed from "hammering out" the details of the sale of contract, unlike the ultimate purchaser who was given that opportunity right up to the very date of contract closing. The only apparent reason for this differential treatment is the respective races of the parties—the Plaintiffs-Appellants are Black and the ultimate purchaser is white.

The terms[2] of Mr. Beer's contract, as manifested in the document in evidence, as well as the differential treatment accorded the Plaintiffs-Appellants in the contract negotiation, coupled with the acknowledged racial identification of the Plaintiffs-Appellants during the process of sale and negotiation, establish a prima facie case of discrimination, unrebutted.[3]

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[2] The Defendant-Appellee seeks to represent that the Plaintiffs-Appellants sought to have the appliances "guaranteed". All the Plaintiffs-Appellants sought (as the evidence reflects) is that the appliances be "guaranteed" to be in working condition as they were at the time the price was agreed upon. Furthermore, the Plaintiffs-Appellants sought to have the house delivered, as it was at the time the price was agreed upon. To the extent that either or both of these contract terms were raised and are perceived to be guarantees, Plaintiffs-Appellants submit that such are standard requests invariably given (as they were in effect given to the ultimate purchaser herein).

[3] In *Husbands* v. *Commonwealth of Pennsylvania*, 395 F. Supp. 1107, 1139 (E.D. Penn. 1975), the Court, in defining prima facie, noted:

> "In the second sense of the concept, however, courts use prima facie to mean not only that plaintiff's evidence would

CONCLUSION

Most significantly, the Defendant-Appellee, citing *Bush* v. *Kaim,* 297 F. Supp. 151, 163 (N.D. Ohio 1969) points out at page nine of her brief:

> "It is not sufficient that differences between the plaintiff and other applicant exist. The owner must also show that he actually considered these other factors and used them, rather than race, as the basis for making his decision."

The bottom line herein is that, assuming that, legitimate differences did exist in the treatment of the Plaintiffs-Appellants as contrasted with the ultimate purchaser (an assumption which is in fact very difficult to arrive at from the evidence), nevertheless the Defendant-Appellee never established in the rebuttal of the Plaintiffs-Appellants' case in main that these ostensible differences were actually considered and used in making the decision to sell to the ultimate white purchaser instead of the Black Plaintiffs-Appellants herein. Thus, rather than assuming that they were considered, it must be found, as a matter of law, that the racial factor, which was evidentiary and

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reasonably allow the conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it. Wigmore on Evidence, Vol. 9, § 2494 (1940).

In turn, this latter sense of the concept of prima facie case has been refined further, so that the plaintiff's evidence not only compels defendant to produce evidence on the issue in question, but also shifts the burden of proof to the defendant on this issue. In other words, the plaintiff's evidence establishes a presumption in favor of his contention on the issue, and shifts the risk of non-persuasion on the issue to the defendant."

It is submitted that the Plaintiffs-Appellants' case not only reasonably allows the conclusion sought but compels the same.

clearly raised early on in the transaction, was the basis for the making of the decision.[4] Furthermore, even if it it found that otherwise legitimate considerations were utilized herein, nevertheless, if it is found that the racial factor was considered and utilized, as well, then the action of the Defendant-Appellee must be held to be wrongful and violative of the Plaintiffs-Appellants' rights. It is submitted that, since the white purchaser was permitted to raise and secure contract conditions after the price was agreed upon (albeit a higher price), the Plaintiffs-Appellants made out a convincing prima facie case of differential treatment which remains unrebutted; and that the fact of a higher price does not rebut that case since, if the Plaintiffs-Appellants had not been treated differently than the ultimate white purchaser, the fortuity of a higher price would not have been realized. See: *Drain* v. *Friedman*, 422 F. Supp. 366, 370-371 (N.D. Ohio 1976).

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[4] The Defendant-Appellee would have this Court believe that the Plaintiffs-Appellants are contending that, because of their race, they have a priority in securing the premises here in question. The Plaintiffs-Appellants make no such argument. All the Plaintiffs-Appellants assert is that they have a right to be treated equally in the process of securing the premises; and that they were not accorded treatment equal to that of the ultimate white purchaser. The Defendant-Appellee would also have this Court believe that Thomas Hoffman, Esq., the original attorney for the Plaintiffs-Appellants, was guilty of unethical conduct when he took the witness stand during the hearing on the preliminary injunction in order to establish certain facts of which he had knowledge. Such is an utterly unfounded position. Because of the time factor involved, Mr. Hoffman had no other alternative but to do so; and he did have present another attorney to conduct the examination. Thereafter Mr. Hoffman undertook to secure other counsel to assist the Plaintiffs-Appellants. Certainly the attorney for the Defendant-Appellee, with personal knowledge of otherwise corroborated and uncontradicted pivotal evidence, had the obligation to come forward with rebutting evidence or otherwise be prohibited from arguing the contradictory inference and then to justify the same on the specious grounds that Mr. Hoffman took the stand and should not have been permitted to do so. It just does not make any common sense.

In view of the foregoing, Plaintiffs-Appellants respectfully submit that the judgment of the Court below should be reversed; and that the matter be remanded for further action consistent with the mandate herein.

Respectfully submitted,

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Certificate of Service

James I. Meyerson, Esq., one of the attorneys for the Plaintiffs-Appellants herein, certifies that on the 24th day of June, 1977, I did serve three copies of the foregoing Reply Brief upon the attorney for the Defendant-Appellee by mailing the same, postage prepaid, first class, as follows: Gerald Murray, Esq. 90-61 Sutphin Boulevard, Jamaica, Queens, New York 11435.

Respectfully submitted,

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